No. 14,348

IN THE

United States Court of Appeals

For the Ninth Circuit

MARIO BALESTRERI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF THE CASE.

Appellant was indicted in the United States District Court for the Northern District of California, Southern Division. The indictment was in twenty-four counts. It named twenty-three defendants, and three other persons were named as co-conspirators but not defendants. The twenty-fourth count charged a conspiracy to violate the narcotic laws of the United States on the part of all the defendants, including appellant, and the co-conspirators (T. R. 15-29).

Appellant is also charged in the ninth count of the indictment with violation of the Jones-Miller Act (21 U.S.C. 174).

Appellant entered a plea of not guilty to each of these counts, and a jury trial was commenced on August 17, 1953. The trial consumed a period of five days during which the government produced twenty-nine witnesses, and the jury returned a verdict of guilty against appellant on both the aforesaid counts contained in the indictment (T. R. 30). He was sentenced to three years' imprisonment on each count, the sentences to commence and run concurrently (T. R. 31). No appeal was taken.

Approximately six months after sentence the appellant filed a written motion for a new trial on the ground of newly discovered evidence (T. R. 32).

The District Court, Judge Goodman, filed a written order denying the motion for new trial (T. R. 49-51). A timely notice of appeal was filed (T. R. 52).

SUMMARY OF ARGUMENT.

1. Appellant's affidavit is insufficient as it is based upon hearsay and conclusions of law.

2. The extent of the allegedly newly discovered evidence is in the nature of impeachment.

3. The motion failed to meet the required standards.

4. There is no showing of the abuse of discretion by the trial judge.

ARGUMENT.

The trial judge acted correctly in denying appellant's motion for a new trial upon the grounds of alleged newly discovered evidence.

At page 3 of appellant's brief is found the following statement:

> "At the trial of the defendant the only witness testifying against him was one Harry Winkelblack . . ."

There were in fact twenty-nine witnesses used by the government and, in the absence of the record of their testimony, it must be presumed that said testimony was most favorable to the government.

> "In determining the right to reverse we are required to consider the evidence heard by the District Court not appearing in the record as supporting that court's decision. As stated in In re Chapman Coal Co., 196 F.2d 779, 785: 'Where, as in this case, there has been a hearing in the District Court in which the parties have participated by their attorneys, where evidence has been heard, and where the District Court has entered an order which would be justified by evidence which might have been adduced or agreements which might have been made between the parties in such hearing, the burden is upon the party appealing from such an order to include in the record on appeal a proper transcript of the hearing to show that there was no such evidence or agreement. All possible presumptions are indulged to sustain the action of the trial court. It is, therefore, elementary that an appellant seeking re-

versal of an order entered by the trial court must furnish to the appellate court a sufficient record to positively show the alleged error. Turner Glass Corp. v. Hartford Empire Co., 7 Cir., 173 F.2d 49, 51; Royal Petroleum Corp. v. Smith, 2 Cir., 127 F.2d 841, 843; 12 Cyclopedia of Federal Procedure, 2d Ed. 1944, § 6208, p. 224 et seq.' '' *United States v. Vanegas, Jr.* (9th Cir.), No. 13,753, October 30, 1954.

At the time the witness Winkelblack testified, he was not a United States prisoner. He was on parole from the State of California (T. R. 56).

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1. INSUFFICIENCY OF APPELLANT'S AFFIDAVIT.

Appellant's motion was based upon an affidavit containing only hearsay statement and conclusions of law (T. R. 33-48). Nowhere in said affidavit does affiant explain how or when he discovered the alleged letters attached to the affidavit as Exhibits A and B. The affidavit contains only the conclusions of law that the affiant used due diligence and discovered the letters sometime after the conclusion of the trial. Nowhere in the affidavit do there appear any facts describing the affiant's conduct and/or actions constituting his alleged due diligence. Nowhere in the affidavit is it alleged how or where the affiant discovered the letters attached to the affidavit as exhibits nor is there any allegation from whom the said affiant acquired the newly discovered evidence.

Affidavits containing hearsay statements will not support a motion for a new trial upon the grounds of newly discovered evidence.

> ". . . We have carefully reviewed all of the affidavits and find them to consist largely of hearsay statements and of impeachment of testimony received in the trial . . ." *Wagner v. United States* (9th Cir.), 118 F.2d 801 at 802.

> "The affidavits were ex parte, the affiants were not brought into court where they might have been subject to cross-examination, and where the court might have an opportunity to observe their manner and demeanor." *Martin v. United States* (6th Cir.), 154 F.2d 269 at 270.

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2. IF THE EXTENT OF THE NEWLY DISCOVERED EVIDENCE IS IN THE NATURE OF IMPEACHMENT, IT WILL NOT SUPPORT THE MOTION.

> "Motions for new trials being addressed to the sound discretion of the trial court, and it being manifest the trial court did not act arbitrarily or capriciously nor upon any erroneous concept of the law, the appellate court may not substitute its judgment for that of the trial judge. United States v. Johnson, 327 U.S. 106, 66 S.Ct. 474, 90 L.Ed. 562.

> ". . . The mere discovery of additional impeaching evidence does not meet the requisites for a new trial." *Gage v. United States* (9th Cir.), 167 F.2d 122.

The trial judge, in a written opinion denying appellant's motion for a new trial, stated that the newly

discovered evidence consisted of no more than facts "in the nature of impeachment" (T. R. 49-51).

> ". . . In the application of this rule, the District Court considered whether the so-called newly discovered evidence was cumulative, whether it was diligently obtained and presented, and whether some of it was merely impeaching. The court found that much of the evidence was subject to one or the other of these infirmities and that on the whole it did not meet the standards of newly discovered evidence warranting a new trial. In this we cannot say, as a matter of law, that the trial court erred." *United States v. Johnson* (7th Cir.), 142 F.2d 588.

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3. THE TEST APPLIED IN CONSIDERING THE MOTION.

As to whether or not a motion for a new trial should be granted upon the grounds of newly discovered evidence, this Circuit requires that the following standards be met.

> ". . . There must ordinarily be present and concur five verities, to wit: (a) The evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal. See also Isgrig v. United States, 4 Cir., 109 F.2d 131, 194." *Wagner v. United States* (9th Cir.), 118 F.2d 801 at 802.

It is submitted that appellant made no showing to the trial judge that any of the five above requisites be met.

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4. THE DISCRETION OF THE TRIAL COURT.

The denial or granting of a new trial based upon a motion of newly discovered evidence rests within the discretion of the trial judge.

> ". . . It is the weight of authority in both State and federal courts that newly discovered evidence offered as a basis for a new trial must not be merely cumulative and impeaching. In any event it must be of such a character as would probably produce an acquittal at a new trial. See Johnson v. United States, supra, 32 F.2d at page 130. Obviously if it be merely cumulative and impeaching and of such a character as would not probably result in an acquittal at the new trial, the interest of justice would not be served in granting a new trial. See Rule 33, F.R. Crim. P. The evidence offered by the Frayne and Zimmy affidavits leads straight back to the dispute as to the veracity at the trial. The jury elected not to believe Rutkin and those testifying on his behalf. Veracity of witnesses may not be tested for a second time and by an appellate tribunal.
>
> "We are of the opinion that the new evidence offered was merely cumulative and impeaching and was not of such a character as would probably lead to acquittal at a new trial. The district Judge was of like opinion. Certainly we cannot say that he abused his discretion in refusing the motion for a new trial. Cf. Prisament v. United States, 5

Cir., 1938, 96 F.2d 865, 866 and Wagner v. United States, 9 Cir., 1941, 118 F.2d 801, 802. It is the law that the trial court must be allowed wide discretion in granting or refusing a new trial on the ground of newly discovered evidence. Casey v. United States, 9 Cir., 1927, 20 F.2d 752, certiorari denied 276 U.S. 413, 48 S.Ct. 373, 72 L.Ed. 632." *United States v. Rutkin* (3rd Cir.), 208 F.2d 647 at 654.

CONCLUSION.

It is submitted that the motion for a new trial was properly denied by the trial judge and that there has been no showing of abuse of his discretion in denying said motion. Appellant's affidavit was clearly inadequate and stated no facts as to how, where and when the alleged evidence was discovered. The affidavit alleged merely cumulative or impeaching evidence.

Dated, San Francisco, California,
November 17, 1954.

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